

No. 05-376 SEP 20 2005

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**In The
Supreme Court of the United States**

INVENTION SUBMISSION CORPORATION,
a Pennsylvania Corporation,

Petitioner,

v.

JONATHAN W. DUDAS, Under Secretary of
Commerce for Intellectual Property and Director,
United States Patent and Trademark Office,
U.S. Department of Commerce, in his official capacity,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

**WHETHER AMENDMENT OF A COMPLAINT AFTER
REMAND TO REMEDY INADEQUATE ALLEGATIONS
OF SUBJECT MATTER JURISDICTION SHOULD BE
ALLOWED PURSUANT TO SECTION 1653 OF THE
JUDICIAL CODE?**

PARTIES TO THE PROCEEDING BELOW

Petitioner

Invention Submission Corporation, a Pennsylvania Corporation.

Respondent

Jonathan W. Dudas, Under Secretary of Commerce for Intellectual Property and Director, United States Patent and Trademark Office, United States Department of Commerce, in his official capacity.

CORPORATE DISCLOSURE STATEMENT

Invention Submission Corporation (ISC) is a subsidiary of Technosystems Consolidated Corporation which is privately held.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered June 24, 2005.

I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 413 F.3d 411 (4th Cir. 2005) (Wilkins, Chief Judge, Niemeyer and Shedd, Circuit Judges) and is reprinted in the Appendix hereto at pp. 1-10. The orders of the United States District Court for the Eastern District of Virginia (Brinkema D.J.) dated April 22, 2004, May 5, 2004 and August 13, 2004 are reprinted in the Appendix hereto at pp. 1-19.

II. JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on June 24, 2005. The Supreme Court of the United States has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

III. STATUTORY AND REGULATORY PROVISIONS INVOLVED

The court's authority to allow amendment of a complaint to plead jurisdiction is codified at 28 U.S.C. § 1653 and provides as follows:

§ 1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

IV. STATEMENT OF THE CASE

ISC filed suit against James E. Rogan, Under Secretary of Commerce for Intellectual Property and Director, United States Patent and Trademark Office (PTO), in his official capacity, seeking judicial review of the PTO's scheme to cause ISC irreparable harm through the improper use of agency resources and agency influence. In furtherance of the scheme and motivated by specific animus toward ISC, certain PTO officials orchestrated a media campaign featuring the complaint of one of ISC's clients, Edward Lewis. The Lewis complaint was used to proclaim publicly – through press releases, PTO website articles, radio, print and television advertisements – the misleading and untrue message that the PTO had, in effect, determined that Lewis was “scammed” by ISC and that other inventors should not deal with ISC. Although the PTO did not specifically identify ISC by name, the content and context of the publications, as well as the PTO's public efforts to connect ISC to the Lewis complaint, resulted in ISC's existing and potential customers knowing that ISC was the company featured in the PTO media campaign. The animus alleged by ISC is evidenced by the conduct of John Calvert, Acting Director of the PTO's Office of Independent Inventors Programs, who stated that his “goal in life” is to put invention promotion

companies, like ISC, out of business. See Amended Complaint, ¶¶ 35-36; App. p. 73.

ISC pled subject matter jurisdiction under federal question jurisdiction, 28 U.S.C. § 1331, and the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, as the malicious targeting of ISC by PTO officials constituted final agency action. The Inventors' Rights Act (IRA), 35 U.S.C. § 297, under which Lewis made his Complaint, does not permit the PTO to investigate or make any determination with respect to the validity of any complaint and does not permit public release of a customer complaint outside the neutral forum authorized by Congress in the IRA. Furthermore, the PTO has no authority, general or specific, to directly or indirectly interfere with the lawful business activities of invention promoters like ISC by making false public accusations against them.

The PTO opposed judicial review of its actions by requesting that the complaint be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) based on sovereign immunity. The PTO asserted that its conduct did not constitute final agency action under the APA and therefore there was no waiver of its sovereign immunity. In opposing the PTO's motion, ISC relied heavily on the standard set forth in *Indus. Safety Equip. Ass'n v. EPA*, 837 F.2d 1115 (D.C. Cir. 1988) where the court suggested that an agency's use of false or unauthorized adverse publicity to penalize a party is subject to judicial review under the APA as final agency action. ISC argued before the district court that the underpinnings for the *Industrial Safety* standard of review rests in the case law interpreting final agency action to include unlawful acts by an agency and the "presumption" favoring judicial review of such agency action.